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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 702

ALBERT W. KRAUSE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION.

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PETITION.

To the Honorable, The Supreme Court of the United States:

The petition of Albert W. Krause, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Albert W. Krause filed his petition for naturalization on April 26, 1929 (R. 169) and a certificate of naturalization was issued to him on October 2, 1929, in the District

Court of the United States for the Northern District of Illinois, Eastern Division (R. 172). The petitioner was born in Stolp, Germany, on September 22, 1895, and arrived in the United States of America in the month of January, 1924, from Bremen, Germany.

A complaint was filed in the District Court of the United States of America, Northern District of Illinois, on April 22, 1942, for the cancellation of the citizenship of your petitioner (R. 2) which complaint alleged that the said Albert W. Krause, your petitioner, was guilty of mental reservation in obtaining the said certificate of naturalization. On July 28, 1942, the appearance of Daniel Covelli, attorney was filed (R. 11), and at the same time a motion for a default decree was entered; and, on the 31st day of July, 1942, an affidavit by Miller E. Schaeffer was filed (R. 13) stating that Albert W. Krause was registered in Tulsa, Oklahoma, under the Selective Service Act in the age group between 45 and 65, and that he was not in the military service of the United States; that, on July 31, 1942, there was filed an affidavit of service by publication (R. 14) which was sworn to by James J. Lewis, Assistant United States Attorney for the Northern District of Illinois; that on July 31, 1942, the Honorable Judge Igoe, then and there sitting in the District Court of the United States for the Northern District of Illinois, entered an order that the United States Attorney enter his motion for a default decree cancelling the certificate of naturalization and giving defendant 10 days to file an answer to the Government's motion (R. 15); that, on July 31st, Galen Hunt, an attorney, substituted for Daniel Covelli (R. 12), and on August 10th, the said attorney filed an answer on behalf of your petitioner (R. 16), and that the said trial commenced on September 15, 1942, and was concluded on September 22, 1942, when a decree was entered (R. 183) revoking the certificate of naturalization theretofore issued by the United States of America to your petitioner, Albert

W. Krause; thereafter, Joseph T. Harrington was retained to represent the defendant, and, on December 16th, there was a motion to vacate the decree and dismiss the cause (R. 186) on the grounds that the defendant was not a resident of Chicago, Illinois, at the time of the commencement of the action, nor was he a resident within the jurisdiction of the District Court in which said cause was tried, and that the plaintiff in said action, the United States of America, by its agents, knew such facts, and, on September 29, 1942, a week after the said revocation of citizenship was granted, the defendant was taken into custody and placed in an internment camp, and was not present at any of the proceedings on the motion to vacate the decree; that the District Court entered an order on December 16, 1942 (R. 188) giving the Government five days within which to answer the motion to vacate the decree, and thereafter two days were granted to the defendant to reply to the Government's answer. On December 23rd, the Court continued the matter until December 29th, and on that date the Court denied said motion to vacate (R. 252), and thereafter on the 29th day of December an amended motion to vacate the decree was presented (R. 229), and the Court, after reading, denied leave to the defendant to file the same (R. 252). On December 19, 1942, there was a petition filed (R. 197) with an affidavit in support thereof for the appointment of a guardian *ad litem* for Carlos Henry Krause, son of your petitioner herein, a minor, then three years of age, and also a petition for the issuance of a subpoena *duces tecum* directed to the heads of the State Department and the Selective Service System, Tulsa, Oklahoma, and to the Federal Bureau of Investigation. On December 29th, the motion to appoint a guardian *ad litem*, together with the amended motion to vacate the decree, and the petition for the issuance of a subpoena *duces tecum* for the heads of the State Department, Selective Service System, Tulsa, Oklahoma,

and the Federal Bureau of Investigation, and for a writ of habeas corpus *ad testificandum* was denied (R. 252) at which time there was an appeal prayed and allowed, bond being duly filed for such appeal from the decree of the Court to reverse the decree of said District Court and from the order entered December 29, 1942. Thereafter, an appeal was perfected to the Circuit Court of Appeals for the Seventh Circuit, and, on June 30, 1943, said Circuit Court of Appeals for the Seventh Circuit did affirm the decree entered in the District Court on September 22, 1942, cancelling petitioner's certificate of citizenship, said case being reported in Vol. 136, Federal Reporter, 2nd Series, at page 935.

That, subsequent to the rendering of the decision of the Circuit Court of Appeals for the Seventh Circuit, and on, to wit, September 19, 1945, your petitioner, through his attorney, Joseph T. Harrington, did present a motion to vacate the mandate order of June 30, 1943, affirming the decree of denaturalization, and did further move the Court to admit the defendant to bail pending the hearing of said cause on the grounds of newly discovered evidence, and in support of said motion a sworn petition was then and there attached to said motion, and duly served on United States of America; that in said motion the grounds relied upon for the vacating of the mandate of the Circuit Court were that the opinion written by the Circuit Court of Appeals in said cause, 136 Fed. 2nd, 935, was contrary to the law in the cases of *United States* v. *Schneiderman*, 63 Sup. Ct. 1333 and *United States* v. *Baumgartner*, 64 Sup. Ct. 1240, the latter case having been decided by this Honorable Court subsequent to the rendering of the decision herein by the Circuit Court of Appeals for the Seventh Circuit in 136 Fed. 2nd, 935, that the said petition of Joseph T. Harrington, attorney for the petitioner, represented unto the Court that your petitioner was interned

at Crystal City, Texas, and had been so interned since June 22, 1943; that originally in the matter pending in the District Court he was represented by Daniel Covelli, an attorney, who accepted a $250.00 fee from your petitioner, filed his appearance although at the time your petitioner was a resident of Oklahoma City, Oklahoma; that, thereafter, said Daniel Covelli called your petitioner into his office and returned the $250.00 retainer fee, stating it would be necessary for your petitioner to obtain other counsel as he could not represent him, and at that time gave him a check, which check was a personal check on the said Daniel Covelli's bank account.

Said petition further represented that Galen Hunt, an attorney, then substituted his appearance for the said Daniel Covelli, that he was paid a retainer fee by your petitioner in the sum of $250.00, and in addition was given the names of various witnesses to be called on behalf of said defendant, and that the defendant also requested the files of the Selective Service System at Tulsa, Oklahoma, which would show that he had volunteered to enlist in the United States Coast Guard at the time of his registration under the Selective Service Act, and also a request that the Federal Bureau of Investigation files be brought into Court by subpoena *duces tecum;* that the files of the State Department in reference to your petitioner when he made application for passport to Switzerland while acting as a representative of the Thomas B. Gibbs Manufacturing Company of Delavan, Wisconsin, be brought in; said petition further represented that thereafter, when the Hon. Philip L. Sullivan of said District Court entered an order on August 24, 1942, setting the matter for trial September 14, 1942, said Galen Hunt failed to present any petition to obtain the subpoena *duces tecum,* and stated to the defendant therein that the Court would not enter an order against any of such agencies, although there was no proper

presentation made to the Court for the same, and that the said cause was continued to the next day, and that, although the Court warned the said Galen Hunt that he intended to finish the case that week, no subpoenas were issued for the various witnesses; that, after the Government had closed its case, the said Galen Hunt put the defendant, Albert W. Krause, on the witness stand in his own defense, and failed to call or subpoena or notify either by phone, letter or otherwise the various witnesses furnished to the said Galen Hunt by the defendant; and that said neglect and refusal on the part of said attorney created a miscarriage of justice, which the Court was unable to prevent because the Court had no knowledge that the attorney representing the defendant was concealing from the Court facts which, if they had been disclosed to the Court, would have resulted in a judgment dismissing the petition for denaturalization of the said Albert W. Krause.

Said petition further represented that Albert W. Krause was taken into custody shortly after the decree was entered in said cause denaturalizing said Albert W. Krause, that no appeal was prayed, nor was any bond fixed for the defendant to be released upon bail pending a decision by the Circuit Court of Appeals. Said petition further represented that Joseph T. Harrington was consulted with reference to said matter in the second week of December, 1942, when he interviewed said Galen Hunt and wanted to know why he had not asked for a jury trial, and the said Galen Hunt stated, "I don't think you are entitled to a jury trial in this kind of a case because it is a chancery matter and not a law matter."

Your petitioner further represented that, when he questioned said Galen Hunt as to why he had not called the various witnesses on behalf of defendant, said Galen Hunt stated he was not very familiar with the federal court practice, and that his failure to do so was his ignorance

of procedure in the Federal Court. Said petition further represented that, when he was called into the matter, he made a motion to vacate said decree on the ground of lack of jurisdiction of the Federal Court of the Northern District of Illinois, Eastern Division, to pass upon said matter because the defendant was a resident of Tulsa, Oklahoma; that thereafter the Court denied the motion to vacate said decree of denaturalization.

Said petition further stated that at the time, and because of the state of war between the United States of America and Germany, it was impossible for the defendant, or his attorney, to find out what was in the State Department files; that, since the surrender of Germany on May 8, 1945, said petitioner was able to obtain certain photostatic copies of documents in reference to the passports issued to the said Albert W. Krause, which would have been presented to the Court on a hearing of this petition so denied by the Circuit Court of Appeals, and which evidence upon said hearing would have shown that the several trips made by the said defendant to Europe were purely trips for and in behalf of the Thomas B. Gibbs Manufacturing Company of Delavan, Wisconsin.

Said petition further represented that, since the surrender of Germany, the said Albert W. Krause reverted back to the status of an alien; that previously thereto he had been an enemy alien; and that he would, therefore, be entitled to his discharge on a writ of habeas corpus filed in the district in which he is confined, which is Crystal City, Texas, but that the said discharge under a writ of habeas corpus would not restore his citizenship.

Said petition further represented that at the time of the hearing of said trial in the District Court the Thomas B. Gibbs Manufacturing Company was engaged in war work, and Mr. Thomas B. Gibbs informed the petitioner that after the termination of the war between the United

States and Germany and Japan he would be able to disclose information which he was bound to keep secret under the law, that he was bound to disclose no evidence which might in any way affect the war effort.

Wherefore, said petition requested the Circuit Court of Appeals to enter an order upon the United States of America to answer said petition within a time to be fixed by the Court; that the cause be set down for hearing before the District Court at a date convenient to said court; and said petition further requested the Court, pending the hearing, that Albert W. Krause be released from the internment camp located at Crystal City, Texas, either on independent bond or bail in an amount to be fixed by said Court with Henry Crew, 620 Library Place, Evanston, Illinois, as surety; that, thereafter, the United States of America moved to deny the defendant's motion, and further moved to dismiss defendant's petition; that thereafter, on October 1, 1945, said Circuit Court of Appeals denied the motions and petition of counsel for defendant to set aside the decree of denaturalization entered in said cause, to enter a rule upon the United States District Attorney to answer within a time fixed by the Court, to have the cause set for hearing before the District Court and to release the defendant on bail pending the hearing, and further said Court ordered that the motion of defendant to strike plaintiff-appellee's answer to said petition and to admit defendant to bail, and to have the cause set down for oral argument be denied.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioner is informed and believes that the said judgment of the United States Circuit Court of Appeals

for the Seventh Circuit in said case is erroneous, and that this Honorable Court should require the said case to be certified to this Court's review and determination in conformity with the provisions of Sec. 240 (a) of the Judicial Code as Amended by the Act of February 13, 1945. The Circuit Court of Appeals for the Seventh Circuit, in affirming the decree of the District Court entered on September 22, 1942, stated:

> "We are convinced that in the case at bar the Government did sustain the burden of proving that appellant's conduct and expression in later years were opposed to the principle of the Constitution. Applying the long line of cases which the Court does not overrule by its decision in the *Schneiderman* case, we are further convinced that such conduct and expression may be relied upon to show that the oath of allegiance was taken with such mental reservations as to render it wholly nugatory, and that being the case, that the certificate of citizenship issued in reliance thereon was illegally procured." (page 939.)

Your petitioner states that the facts involved in the substance of this case are in no way different from those involved in *U. S.* v. *Schneiderman,* 63 Supreme Court 1333, and in the case of *U. S.* v. *Baumgartner,* 64 Supreme Court, 1240, which was decided after the decision in the Circuit Court of Appeals, herein in 136 Fed. (2d) 935.

Your petitioner further states that the Circuit Court of Appeals for the Seventh Circuit has rendered a decision in this case deciding an important question of federal law and a matter of highest importance to the persons involved in conflict with the applicable decisions of the Supreme Court of the United States.

Your petitioner further states that he was granted his certificate of naturalization on October 2, 1929; that none of the sixteen witnesses who testified in behalf of the Government (R. 25 to 104) in this cause testified to, nor

could any person testify to any statements, actions or conduct on his part which occurred for the period of five or more years prior to the granting of such certificate of naturalization that would justify the decree of cancellation of his citizenship; that, of all the witnesses who testified in this cause in the District Court, only one witness testified that he knew the defendant prior to the granting of said certificate of naturalization (R. 25 to 30), and this witness did not and could not testify to any statements, actions or conduct on the part of your petitioner which would have denied to him a certificate of naturalization in 1929; that one other witness (R. 30 to 41) who testified that she knew him since 1929 did not and could not testify to any conduct on his part that would have denied the granting of a certificate of naturalization had the same been known by the District Court in 1929. That all of the statements, actions or conduct relied upon for the denaturalization of petitioner were statements or acts that occurred many years subsequent to the granting of the certificate of naturalization, and there is absolutely no evidence of any nature in the record that would justify any finding that there was any mental reservation on the part of your petitioner at the time he took the oath prior to becoming a naturalized citizen of the United States of America.

Wherefore, Your Petitioner Respectfully Prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled *United States* v. *Krause*, No. 8221, to the end that the said case may be reviewed and determined by this Court as provided by

Sec. 240 (a) Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate, and in conformity with said provision of the Judicial Code, and that the said Judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

JOSEPH T. HARRINGTON.
Attorney for Petitioner.

Joseph T. Harrington, being first duly sworn on oath, deposes and states that he is a duly licensed and practicing attorney in the State and Federal Courts of Illinois and the Supreme Court of the United States of America; that he is the attorney for Albert W. Krause, who is presently interned by the United States of America at Crystal City, Texas; that he has read the foregoing petition for writ of certiorari and that the matter therein set forth is true in substance and in fact.

JOSEPH T. HARRINGTON,

Subscribed and sworn to before me this 27th day of December, 1945.

IRVING LEWIS,
Notary Public.

(Seal)

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 702

ALBERT W. KRAUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 17, 1942, after a trial before the court in which petitioner was present and represented by counsel of his own choice (R. 21–167), the United States District Court for the Northern District of Illinois entered a decree canceling the certificate of naturalization issued to petitioner in the same court on October 2, 1929, on the ground of fraud in his oath of allegiance in that he did not intend to renounce all allegiance to the German Reich or bear true faith and allegiance to the United States (R. 183–185). Motions for a new trial and for arrest of judgment were denied (R. 168). A later motion to vacate the denatural-

ization decree (R. 186–188) and a motion for the appointment of a guardian *ad litem* for petitioner's minor son, for issuance of subpoenas duces tecum to the heads of the State Department, the Selective Service System of Tulsa, Oklahoma, and the Federal Bureau of Investigation, and for issuance of a writ of habeas corpus *ad testificandum* for petitioner (R. 197–198), were also denied (R. 218–219, 252–253), as was leave to file an amended motion to vacate (R. 229–252), after full hearings before the trial judge (R. 207–218, 219–228). On appeal to the Circuit Court of Appeals for the Seventh Circuit from the denaturalization decree and the denial of the motion to vacate that decree, as well as from the denial of leave to file an amended motion to vacate and from the order denying the motion for appointment of a guardian *ad litem,* etc., the judgment and orders of the district court were affirmed on June 30, 1943 (R. 288–297; 136 F. 2d 935), and the mandate of the Circuit Court of Appeals issued on July 21, 1943 (R. 297).

On September 19, 1945, petitioner filed in the original proceeding in the circuit court of appeals a motion (R. 298) and a petition of his attorney, as his representative (R. 299–303), "to set aside the decree of denaturalization" entered against him, to enter a rule upon the United States Attorney to answer within a time fixed by the court, to have the cause set for a hearing be-

fore the district court, and to release petitioner on bail[1] pending such hearing. Leave to file this motion was granted (R. 303–304), and the United States Attorney responded by moving to deny the motion and dismiss the petition (R. 304–308). On October 1, 1945, the circuit court of appeals, without an opinion, denied the motion and petition (R. 311).

We believe that the court below was correct in denying petitioner's motion. The sole basis of the motion appears to be that the judgment of the circuit court of appeals was contrary to certain of the pronouncements made by this Court in *Schneiderman* v. *United States,* 320 U. S. 118, and that the said judgment was subsequently overruled by this Court in the case of *Baumgartner* v. *United States,* 322 U. S. 665 (R. 298).[2] Peti-

[1] Petitioner was at the time confined at Crystal City, Texas, as an enemy alien (R. 299, 302).

[2] The only supporting statement in petitioner's motion is "* * * that the opinion written by the United States Circuit Court of Appeals in his case, 136 Fed. 2d 935, is contrary to the law in the case of U. S. v. Schneiderman, 66 U. S. Supreme Reports as to paragraphs 4, 5, 6, 7, and 8, and has been overruled by the United States Supreme Court in the case of U. S. v. Baumgardner." The only new matter asserted was contained in paragraph 8 of the petition accompanying the motion in the circuit court of appeals, in which petitioner's attorney asserted: "That since the surrender of Germany on May 8th, 1945, your petitioner has had placed at his disposal certain photostatic copies of documents in reference to the passports issued to the said Albert W. Krause which will be presented to the Court on

tioner, therefore, sought reconsideration of the decision of the circuit court of appeals merely in the light of the principles later established by this Court in the *Baumgartner* case. However, the term at which the judgment of the circuit court of appeals was entered in petitioner's case had long since expired [3] when petitioner filed his motion. The motion, therefore, came too late. It is a settled rule that federal trial and appellate courts have no power after term to reexamine or alter their judgments for claimed errors of law. See *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238, 244; *Realty Co.* v. *Montgomery,* 284 U. S. 547, 551–552; *Ex parte National Park Bank,* 256 U. S. 131, 133; *United States* v. *Mayer,* 235 U. S. 55, 68–69; *Bronson* v. *Schulten,* 104 U. S. 410, 415.

If petitioner's motion be considered as a bill of review or an application for leave to file a bill

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the hearing of this matter" (R. 302). But there is no showing that this evidence is in any way material, or that it is different from the exhibits (copies of correspondence between the State Department and petitioner's employer regarding passports for the latter, R. 232–252) attached to the amended motion to vacate the decree of denaturalization (R. 229) which petitioner submitted to the trial court in December 1942 and which that court denied him leave to file (R. 252–253).

[3] Rule 2 of the circuit court of appeals provides that one term shall be held annually commencing on the first Tuesday in October and continuing until the first Tuesday of the next October.

of review in the district court (see *Hazel-Atlas Co.* v. *Hartford Co., supra,* at 244–245, 248–249), he stands in no better position. A bill of review is not sustainable after term to set aside a decree canceling a certificate of naturalization, since such a proceeding is not a part of the cause in which the original decree was rendered, but is a new and independent proceeding requiring process, and consequently cannot be brought against the United States without its consent. *Zegura* v. *United States,* 104 F. 2d 34, 35–36 (C. C. A. 5), certiorari denied, 308 U. S. 586; *Gherwal* v. *United States,* 46 F. 2d 998 (C. C. A. 9). But apart from this obstacle, petitioner's application lacks the requisites of a bill of review, for "Bills of review are on two grounds; first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result." *Scotten* v. *Littlefield,* 235 U. S. 407, 411. And a subsequent, more authoritative interpretation of the law—the only ground relied upon by petitioner—even if its application would require a different result, "will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably

requiring a different result." *Scotten* v. *Littlefield, supra.*[*]

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

FEBRUARY 1946.

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[*] Assuming that the federal courts possess a correctional jurisdiction analogous to that exercised at common law on writ of error *coram nobis* (cf. *United States* v. *Mayer*, 235 U. S. 55), petitioner has not made out a case for relief, since his motion did not rest upon an asserted error of fact not put in issue but material to the validity of the original proceeding itself, the only basis for relief under such writ. As this Court said in *Phillips* v. *Negley*, 117 U. S. 665, 673, the common law writ of error *coram nobis* was the means "by which errors of fact might be corrected, limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, and the like, or error in the process through the fault of the clerk; for which writ * * * in practice, a motion is now substituted, heard in a summary manner upon affidavits."

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